Siang Galau v Ang Wak Hiong

HIGH COURT (KUCHING) — CIVIL APPEAL NO KG13 OF 1991
CHONG SIEW FAI J
4 SEPTEMBER 1993

Civil Procedure *— Appeal — Time — Memorandum of appeal — Time period for filing memorandum of appeal —Appellant represented by counsel — Rules of the High Court 1980 O 55 r 2(4) — Subordinate Courts Rules 1980 O 49 r 2(4)*

In the magistrates' court, where both the appellant and respondent were represented, the appellant's defence was struck out and the respondent was allowed to enter judgment in the sum of RM13,228.96 and damages to be assessed. In this appeal, counsel for the respondent raised a preliminary point that the memorandum of appeal was filed and a copy thereof served on the respondent out of time, and no ground had been shown for the delay. As such, the appeal, it was submitted, should be dismissed. For the appellant, however, counsel argued otherwise, contending that the filing and service thereof were within the permitted time. The issue in dispute was whether the provision of the rules require the filing and the service of the memorandum of appeal within 14 days from the date of service of Form 141 on the appellant through his advocate.

Held, dismissing the appeal:
The insertion of O 49 r 2(4) of the Subordinate Courts Rules 1980 ('the SCR') into O 55 r 2(4) of the Rules of the High Court 1980 ('the RHC') clearly covers all appellants other than those unrepresented by advocates or are poor persons. Thus it applies to an appellant who is represented by an advocate. Now, reading O 55 r 2(1) and (2) of the RHC in conjunction with that of O 49 r 2(4) of the SCR, it is clear that the memorandum of appeal must be filed and a copy thereof served on the respondent within 14 days after service of Form 141 on the appellant who is represented. Therefore, the memorandum of appeal in this case was filed and served out of time.

[Bahasa Malaysia summary

Di mahkamah majistret, di mana kedua-dua perayu dan responden telah diwakili, pembelaan perayu telah ditolak dan responden telah dibenarkan mencatat penghakiman untuk jumlah sebanyak RM13,228.96 dan ganti rugi yang perlu ditaksir. Dalam rayuan ini, peguambela untuk responden telah membangkitkan suatu perkara permulaan bahawa memorandum rayuan telah difailkan dan sesalinan memorandum rayuan itu telah disampaikan kepada responden di luar had masa, dan alasan tidak diberi untuk kelengahan itu. Oleh itu, telah dihujahkan bahawa rayuan itu sepatutnya ditolak. Peguambela untuk perayu telah berhujah sebaliknya, dengan menyatakan bahawa memorandum rayuan telah difail dan disampaikan dalam tempoh

masa yang ditetapkan. Isu yang dipertikaikan adalah sama ada kaedah-kaedah itu memerlukan supaya memorandum rayuan itu difail dan disampaikan dalam tempoh 14 hari dari tarikh penyampaian Borang 141 atas perayu melalui peguamnya.

Diputuskan, menolak rayuan itu:
Pemasukan A 49 k 2(4) Keadah-Kaedah Mahkamah Rendah 1980 ('KMR itu') ke dalam A 55 k 2(4) Keadah-Kaedah Mahkamah Tinggi 1980 ('KMT itu') dengan jelas melingkungi kesemua perayu selain daripada mereka yang tidak diwakili oleh peguam atau mereka yang miskin. Sekarang, dengan membaca A 55 k 2(1) dan (2) KMT itu bersama dengan A 49 k 2(4) KMR itu, adalah jelas bahawa memorandum rayuan mesti difail dan sesalinannya disampaikan atas responden dalam tempoh 14 hari dari tarikh penyampaian Borang 141 atas seseorang perayu yang diwakili. Oleh itu, memorandum rayuan di dalam kes ini telah difail dan disampaikan di luar had masa.]

Notes
For cases on the time limit for appeals, see 2 *Mallal's Digest* (4th Ed) paras 464–475.

Cases referred to
1 *Kuching Pharmacy Sdn Bhd v JL Morison Son & Jones (M) Sdn Bhd* [1990] 2 MLJ 170 (not folld)
2 *Shafie bin Ahmad v Hajjah Fatimah bte Ahmad & Ors* [1991] 3 CLJ 2217 (not folld)
3 *Elayachee v Woo Siu Tip* [1991] 3 MLJ 108 (folld)
4 *Hj Abdul Ghani bin Kesah v Tuan Ahmad bin Tuan Man* [1990] 3 MLJ 45 (refd)
5 *Mansor bin Sulaiman & Anor v Liaw Ket Sang* [1992] 3 CLJ 1726 (refd)
6 *Shobri bin Hasan v Ramalingam* [1993] 1 MLJ 263 (refd)

Legislation referred to
Rules of the High Court 1980 O 55 r 2
Subordinate Courts Rules 1980 O 49 rr 2(4), 3A(1)

JM Lim (*JM Lim & Co*) for the appellant/defendant.
June Chan (*Satem, Sagah & Chai*) for the respondent/plaintiff.

Cur Adv Vult

Chong Siew Fai J: At the commencement of the hearing of this appeal against the decision of the Magistrates' Court at Kuching striking out the defence and allowing the plaintiff to enter judgment in the sum of RM13,228.96 and damages to be assessed, counsel for the respondent/plaintiff raised a preliminary point that the memorandum of appeal was filed and a copy thereof served on the respondent/plaintiff out of time, and no ground had been shown for the delay. As such, the appeal, it was

submitted, should be dismissed. For the appellant/defendant, however, counsel argued otherwise, contending that the filing and service thereof were within the permitted time.

The undisputed facts, so far as are relevant to the point in issue, are as follows:

(a) Both the appellant/defendant and the respondent/plaintiff were represented in the magistrates' court.
(b) The ruling or judgment appealed against was given on 5 April 1991.
(c) On 13 April 1991, the appellant/defendant through his advocate filed the notice of appeal.
(d) On 7 May 1991, the appellant/defendant was, through his advocate, served with a notice notifying that notes of evidence and the grounds of judgment were ready (hereinafter referred to as 'Form 141').
(e) The memorandum of appeal dated 31 May 1991 was filed with the High Court registry on the same date it was dated, ie 31 May 1991, and a copy thereof was served on the respondent/plaintiff through his advocate on the same date, ie 31 May 1991.

In other words, the appellant/defendant through his advocate filed and served the memorandum of appeal after the expiration of 14 days of the service of Form 141 on his advocate.

The issue in dispute is simple, ie does the provision of the Rules of the High Court 1980 ('the RHC') require the filing and the service of the memorandum of appeal within 14 days from the date of service of Form 141 on the appellant/defendant through his advocate? If it does not, the filing and the service of the memorandum of appeal would have been within the permitted time; but if it does, then the filing and the service would have been out of time.

There are two lines of authorities. On the one side are cases like *Kuching Pharmacy Sdn Bhd v JL Morison Son & Jones (M) Sdn Bhd*[1] and *Shafie bin Ahmad v Hajjah Fatimah bte Ahmad & Ors*[2] to the effect that an appellant who is represented has six weeks from the date of receipt of the notification from the court appealed from that the certified copy of the notes of evidence and the grounds of judgment are ready within which to file a memorandum of appeal. On the other side are cases like *Elayachee v Woo Siu Tip*,[3] *Hj Abdul Ghani bin Kesah v Tuan Ahmad bin Tuan Man*,[4] *Mansor bin Sulaiman & Anor v Liaw Ket Sang*[5] and *Shobri bin Hasan v Ramalingam*[6] holding that a represented appellant has 14 days from the date of receipt of Form 141. It should, however, be noted that *Hj Abdul Ghani*'s case,[4] was decided before O 55 r 2(1) of the RHC was amended by PU(A) 462/90 which came into effect on 1 January 1991, ie decided before the words 'under ... rule 2 sub-rule (4)' of O 49 were added by the said PU(A) 462/90.

It must first be recognized that the filing and service of a memorandum of appeal constitute an essential part of the appeal procedure. Order 55 r 4(3) of the RHC provides that if the memorandum is not filed or served within the prescribed time and no sufficient ground is shown for the delay, the appeal may be dismissed. Also, r 3 of the said O 55 makes the filing and the service of a notice of cross-appeal dependent upon the service of the

A memorandum of appeal. Besides, a memorandum of appeal drawn up according to the provisions of the RHC would give appropriate notice to the respondent of the grounds of appeal to meet (see *Elayachee v Woo Siu Tip*[3] at p 110D–H col 1; and Form 113A).

Secondly, it must be noted that the memorandum of appeal does not form part of the appeal record required to be filed and served. Order 49 r 3A(1) of the Subordinate Courts Rules 1980 ('the SCR') provides, inter alia, that the appeal record shall contain copies of:

(a) the relevant pleadings;
(b) the notes of evidence;
(c) the grounds of judgment...;
(d) the decision;
(e) the notice of appeal;
(f) all such documentary exhibits and other documents ... relevant for the ... appeal.

See also the similar provisions in r 3(1) of the said O 49 that applies to an unrepresented appellant or appellant appealing as a poor person.

Since a memorandum of appeal does not form part of the appeal record but is essential to an appeal, when has it to be filed and served? While not disputing that Form 141 was served on his firm on 7 May 1991 and that the memorandum of appeal dated 31 May 1991 in the instant case under appeal was filed and served on 31 May 1991, ie more than 14 days but less than six weeks after service of Form 141, counsel for the appellant/defendant submitted that the filing and service was within the permitted time, relying on *Kuching Pharmacy Sdn Bhd v JL Morison Son & Jones (M) Sdn Bhd*[1] and *Shafie bin Ahmad v Hajjah Fatimah bte Ahmad & Ors.*[2]

With respect, I find myself unable to agree with the contention.

For reasons given below, I prefer the *Elayachee v Woo Siu Tip*[3] line of decisions to that of *Kuching Pharmacy Sdn Bhd v JL Morison Son & Jones (M) Sdn Bhd*[1] and the others. Order 55 r 2 of the RHC provides:

(1) The appellant shall, within fourteen days from the date of service on him of the notice in Form 141 under Order 49 rule 2 sub-rule (4) or rule 3 sub-rule (2) of the Subordinate Courts Rules 1980 (as the case may be) file in the High Court in duplicate a memorandum of appeal in Form 113A.
(2) The appellant shall within the like period serve each respondent with a copy of such memorandum and a copy of the appeal record.

Thus, O 55 r 2(1) and (2) quoted above require an appellant to file and serve the memorandum of appeal within 14 days from the service of Form 141 under O 49 r 2(4) or O 49 r 3(2) of the SCR.

Now, although O 49 r 3 of the SCR applies to appellants who are not represented by advocates or who appeal as poor persons, O 49 r 2(4) is a general provision. It reads: 'As soon as the certified copy is ready, the Court shall notify the appellant in Form 141.'

The insertion of the said O 49 r 2(4) into O 55 r 2(4) of the RHC by PU(A) 462/90 clearly covers, in my opinion, all appellants other than those unrepresented by advocates or are poor persons. Thus, it applies to an appellant who is represented by an advocate. Now, reading O 55 r 2(1) and

(2) of the RHC in conjunction with that of O 49 r 2(4) of the SCR, it appears clear that the memorandum of appeal must be filed and a copy thereof served on the respondent/plaintiff within 14 days after service of Form 141 on the appellant who is represented.

For the above reasons, I hold that the memorandum of appeal herein dated 31 May 1991 was filed and served out of time, ie after the expiration of 14 days of service of Form 141 on the appellant through his advocate. The preliminary point, therefore, succeeds. No extension of time was applied for and obtained for the late filing and service. The appeal, therefore, must and is hereby dismissed with costs to the respondent/plaintiff.

Before concluding, I would add that it seems to me some amendments and re-arrangements of O 49 of the SCR and O 55 of the RHC would clear the anomaly and be of convenience to practising advocates and solicitors in complying with the procedural provisions in appeals, for example: The requirement of service of 'a copy of the *appeal record*' '*within the like period*' in O 55 r 2(2) of the RHC does not seem consistent with O 49 r 3A(4) of the SCR respecting service of a copy of appeal record *within six weeks*; also, it would appear more convenient that procedural provisions relating to appeals be, as far as possible, grouped under either the RHC or the SCR with a general reference of them in the other. As it is, a concerned party has, for example, to refer to the RHC respecting the filing and service of the memorandum of appeal and then to the SCR on the subsequent filing and service of the appeal record.

Appeal dismissed.

Reported by Jeanne Tan